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QUESTIONS PRESENTED

1. Whether a district court conducting "pretrial proceedings" under the express grant of authority in 28 U.S.C. § 1407 is empowered to order a transfer for trial under 28 U.S.C. § 1404(a).

2. Whether this Court should vacate a judgment entered after an error-free trial, based solely on petitioners' claim that the case should not have been retained in Arizona for trial, when petitioners never asked the Judicial Panel on Multidistrict Litigation to remand the action to the transferor court, petitioners have never alleged any concrete prejudice caused by the locus of the trial, and the sole claim that survived for trial should have been dismissed as a matter of law during pretrial proceedings.

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IN THE

Supreme Court of the United States

October Term, 1996

No. 96-1482

LEXECON INC., *et al.*,

Petitioners,

vs.

MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENTS MILBERG WEISS BERSHAD HYNES & LERACH, *et al.*

The law firm of Milberg Weiss Bershad Hynes & Lerach, along with Patrick Coughlin, William S. Lerach, Kevin P. Roddy, Leonard B. Simon, Melvyn I. Weiss, Patricia Hynes, Michael C. Spencer, and Stephen R. Steinberg (the "Milberg respondents") file this brief for respondents.[1]

STATUTES INVOLVED

The multidistrict litigation statute, 28 U.S.C. §§ 1407(a), (b), (e), (f), and (h), and the federal transfer statute, 28 U.S.C. § 1404(a), are reprinted in the appendix.

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[1] The remaining respondents — the law firm of Cotchett, Illston & Pitre, along with Joseph Cotchett and Susan Illston (the "Cotchett respondents") — will file a separate brief.

STATEMENT OF THE CASE

Petitioner Lexecon Inc. ("Lexecon") was a defendant in the massive litigation arising from the failure of the Lincoln Savings & Loan Association that was consolidated in the District of Arizona. Lexecon was named because it had prepared reports for federal and state regulators in which, despite having received regulators' reports showing extensive regulatory violations and criminal activity involving Lincoln Savings, Lexecon represented that "Lincoln is sound," is "safer than comparable thrifts," and is "safer than when acquired." In the *Lincoln Savings* case, Lexecon failed to obtain dismissal of the claims against it, failed to win summary judgment after extensive discovery, and failed to obtain a directed verdict after a four-month trial. Ultimately, as jury deliberations were about to commence, Lexecon paid the *Lincoln Savings* class more than $700,000 to avoid what would have been, in the words of the trial judge, a "possible catastrophic verdict."

Lexecon and one of its principals, Daniel R. Fischel, then attempted to revive the dispute in another forum — filing this case against respondents, who served as counsel for the *Lincoln Savings* class, alleging that the claims of the class were "baseless," that those claims were "terminated in Lexecon's and Fischel's favor," and that Lexecon had not settled but had decided "voluntarily" to "benefit the class" by paying it more than $700,000. Unsurprisingly, the Judicial Panel on Multidistrict Litigation ("MDL Panel" or "Panel") concluded that this new case involved questions in common with the still-pending *Lincoln Savings* litigation and transferred the case to the District of Arizona, where it was assigned to a new district judge. That court either dismissed or granted summary judgment for the defendants on nearly all of petitioners' claims. After the court transferred petitioners' sole remaining claim to Arizona for trial under section 1404(a), the jury unanimously rejected that claim. Petitioners, without identifying any error or unfairness in the trial, now seek to overturn the final judgment based solely on the assertion that the trial transfer was improper.

1. The *Lincoln Savings* Litigation And Lexecon's Role In That Litigation.

Lincoln Savings involved multiple lawsuits brought in various districts against Charles Keating, American Continental Corporation ("ACC"), its subsidiary Lincoln Savings, and approximately one hundred other defendants, including Lexecon. Those lawsuits were all transferred by the MDL Panel under 28 U.S.C. § 1407 to the District of Arizona, to be supervised by the Hon. Richard M. Bilby. By the end of that litigation, class counsel had secured a $1.2 billion jury verdict and more than $240 million in settlements for their clients.[2]

The claims against Lexecon arose from Lexecon's preparation, for submission by ACC/Lincoln to federal and state banking regulators, of false reports advocating the purported safety of Lincoln's operations and the value of Lincoln's assets. The plaintiff class alleged that Lexecon, by issuing those false reports despite having reviewed government analyses detailing Lincoln's criminal misconduct, wrongfully assisted in propping up Lincoln Savings long enough for ACC/Lincoln to sell millions of dollars of worthless securities. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 794 F. Supp. 1424, 1448 (D. Ariz. 1992).

After extensive discovery, Lexecon filed a motion for summary judgment, which Judge Bilby denied in a published opinion. *Id.* at 1448-49. The court observed that Lexecon's reports asserted that Lincoln Savings was both "sound" and "safe," even though Lexecon

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[2] The summary of facts that follows is derived principally from judicial decisions. In contrast, petitioners' statement of facts is derived principally from the highly creative allegations in their complaint. *See* Pet. Br. 3-4. As shown below, those are the same allegations that were declared false by the *Lincoln Savings* trial judge and dismissed by the district court below in a decision that was affirmed by the Ninth Circuit. With the Court's denial of *certiorari* as to the second question presented in this case, petitioners have reached the end of the road in their efforts to revive their rejected allegations concerning what happened in *Lincoln Savings*. In these circumstances, petitioners' continued portrayal of those same allegations as being factual is both misleading and highly inappropriate.

knew about Lincoln's prior wrongdoing, having received and reviewed a Federal Home Loan Bank Board examination report that catalogued Lincoln's "extensive regulatory violations." The district court further observed that "Lexecon knew of Ivan Boesky's plea of guilty to insider trading violations, and of [the Federal Home Loan Bank Board's] concerns about ACC/Lincoln's holdings in the Boesky high yield fund" — junk bond holdings that materially contributed to Lincoln's eventual collapse. In those circumstances, the court concluded that material issues of fact existed as to the falsity of Lexecon's representations. *Id.* at 1448-49; J.A. 32.

In March 1992, Judge Bilby, sitting as an MDL transferee judge, transferred the litigation to his regular docket for trial. Lexecon, although now arguing that such a transfer order is contrary to section 1407, voiced no objection to the transfer for trial. After a four-month trial, Lexecon filed a motion for directed verdict. The court denied the motion, concluding that substantial evidence had been adduced showing that Lexecon had prepared false reports lauding Lincoln's supposed financial integrity even though Lexecon knew that Lincoln was engaging in criminal activities and providing unreliable information:

> [Lexecon] knew all of these bad things about Lincoln. They'd read them. They were writing this report to help . . . [Lincoln's counsel] respond to it. . . . [I]t's obvious that there is a jury question as to whether they [Lexecon] weren't in it much deeper than that.

CR113 Ex. B at 11946-47.[3]

2. Lexecon Settles The Claims Against It To Avoid A Potentially Disastrous Jury Verdict.

On June 22, 1992, as jury deliberations were about to commence, Judge Bilby and counsel for Lexecon and the class

[3] "CR" refers to the record below. "LSCR" refers to the record in *Lincoln Savings*.

participated in an in-chambers settlement conference. Lexecon stated that it wished to avoid a jury verdict, but did not want to be perceived as having "settled" for fear of the effect that might have on Lexecon's professional reputation. J.A. 32. Attempting to accommodate Lexecon's purported concern, Judge Bilby and class counsel agreed to a settlement that was structured so as not to appear to be a standard settlement. Under that "unusual arrangement," Lexecon ultimately paid over $700,000 to the class in exchange for being dismissed. J.A. 32-33.

After Lexecon settled, the jury found all of the remaining defendants liable and assessed damages of $3 billion. LSCR4044-47. Judge Bilby later remitted the award to $1.2 billion. LSCR4325.

3. Petitioners Sue Class Counsel In Federal Court In Chicago And The *Lincoln Savings* Judge Finds That Petitioners' Principal Allegations Are "False."

On November 25, 1992, Lexecon and Fischel filed this diversity action against the Milberg respondents, the Cotchett respondents, and other class counsel, asserting claims of malicious prosecution, abuse of process, tortious interference, defamation, and commercial disparagement. CR1; J.A. 33. Petitioners alleged that *Lincoln Savings* "was terminated in Lexecon's and Fischel's favor," that class counsel "implicitly acknowledg[ed] the lack of merit in their complaint" by agreeing to dismiss Lexecon, and that in paying $700,000, Lexecon "voluntarily" decided to "benefit the class" by "returning the professional fees paid to it by Lincoln and Keating." CR1 ¶¶ 63-64, 92. Apparently hoping to avoid having to defend those factual claims in a forum familiar with the actual underlying events, petitioners chose to file the case in the Northern District of Illinois, a judicial district with no connection to the controversy except for the fact that Lexecon is headquartered there.

On December 7, 1992, Judge Bilby, who was presiding over the still-pending *Lincoln Savings* litigation, convened a hearing by

telephone with class counsel and Lexecon's trial counsel.[4] Judge Bilby expressed grave concern over petitioners' allegations in the Chicago action, including the contention that *Lincoln Savings* had been terminated in Lexecon's favor: "[C]ertainly I would not have been a party to any resolution of this case if I thought it was going to be the basis for someone saying well, Lexecon won the case. . . . I think that this Court has been misused and misled." CR18 Ex. E at 5-6. Judge Bilby directed the parties to file submissions explaining "why I shouldn't . . . set aside the dismissal of this case without prejudice and reinstate the plaintiffs' claim." *Id.* at 6. During a subsequent court hearing, Judge Bilby told Lexecon "you have no right to come in and misrepresent to a judge in Chicago . . . what this, quote, settlement or resolution was, because . . . it wasn't any voluntary payment on your part. . . . I can put up with cornery lawyers, I can put up with contentious lawyers, but I can't put up with the kind of stuff that absolutely misrepresents what was done in my chambers by a group of lawyers." CR18 Ex. K at 44-45; *see id.* at 49-50 ("[Lexecon] wanted to get out of having to go to that jury. . . . [I]t was a bargained-for deal. I mean, how can you say it any other way than that?"); *id.* at 48-49 ("[T]he allegations on Page 24 are just absolutely false. . . . I mean, it sounds like Lexecon's Santa Claus.").

On December 31, 1992, Judge Bilby issued an order "to clarify the terms and conditions" of the dismissal of Lexecon. J.A. 33-35 n.2.[5] That order outlined petitioners' principal allegations in the Chicago suit against class counsel and stated:

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[4] Although the *Lincoln Savings* trial had concluded, no final judgment had been entered because various settlements and other matters had not been completed. A final judgment order was not entered until March 1994. J.A. 35.

[5] The court explained that "[a]s this dismissal was without prejudice [it] retained jurisdiction . . . to clarify the terms and conditions of that dismissal." J.A. 33 n.2. The court added that "pursuant to Fed. R. Civ. P. 60(a) the Court of its own initiative may correct any errors or omissions of the record." *Id.*

> The Court finds these paragraphs [Compl. ¶¶ 63, 64, and 92] to be a false description of the conditions under which Lexecon was dismissed from [the *Lincoln Savings*] case. . . . [I]t does not meet with reality and is factually incorrect.

J.A. 34 n.2. The court emphasized that Lexecon's payment to the class was not "voluntary," but was made so that Lexecon would not have to face a "possible catastrophic verdict." CR383 Ex. 3 at 3 n.1.

In January 1993, Lexecon appealed Judge Bilby's December 31, 1992 order to the Ninth Circuit. Recognizing its case-dispositive significance, Lexecon described the order in its opening brief as "tantamount to a declaratory judgment in favor of Milberg Weiss as defendants in the Chicago lawsuit." Br. 19. The Ninth Circuit subsequently dismissed Lexecon's appeal as premature because a final judgment in *Lincoln Savings* had not yet been entered. J.A. 35. In March 1994, Judge Bilby entered final judgment. *Id.* However, Lexecon chose not to renew its appeal from that judgment, and thus allowed the findings made in the December 31, 1992 order to become final and not subject to further review. *Id.*

4. Multidistrict Transfer And Proceedings In The District Of Arizona.

In February 1993, the MDL Panel issued a conditional order transferring petitioners' Chicago lawsuit to the District of Arizona, where Judge Bilby was to preside over the litigation along with the remainder of *Lincoln Savings*. As petitioners note, among the reasons cited by the MDL Panel for its conclusion that transfer was appropriate were that there was an extensive document depository in Arizona, there was an opportunity for coordination with non-final settlements, and there was a potential for coordination with a pending Ninth Circuit appeal. J.A. 18-19; Pet. Br. 7. That appeal, as petitioners fail to mention, was *Lexecon's own* appeal of Judge

Bilby's December 31, 1992 order finding petitioners' key allegations *in this case* to be false.[6]

As the court of appeals in this case observed, "Lexecon, to put it gently, was no stranger to the District of Arizona" because this entire case arose there. J.A. 44. Lexecon, a sizeable firm that provides services nationwide, had performed in Arizona the professional services for Charles Keating that were challenged in *Lincoln Savings*. Moreover, before it was sued, Lexecon was retained as an expert to assist another defendant in the *Lincoln Savings* litigation pending in Arizona. After it was sued, Lexecon defended against the claims of the *Lincoln Savings* class in Arizona, raised no objection to the permanent transfer of the *Lincoln Savings* case to Arizona for trial, and acquiesced in Judge Bilby's retention of jurisdiction in Arizona to oversee Lexecon's settlement with the *Lincoln Savings* class. Finally, in this litigation, Lexecon successfully urged application of Arizona law to its key claims. Pet. App. 86a.

After the Panel issued its conditional transfer order, Judge Bilby recused himself because of his involvement in Lexecon's settlement negotiations in *Lincoln Savings*. J.A. 33. As a result, the MDL Panel issued a final order transferring the lawsuit to the District of Arizona for supervision by the Hon. John M. Roll. J.A. 17-19. Although petitioners now assail the propriety of that order, *see* Pet. Br. 6-7, they chose not to challenge the order at the time and cannot do so now. *See* 28 U.S.C. § 1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.").

In November 1993, Judge Roll, a former judge of the Arizona Court of Appeals, issued an order dismissing petitioners' Arizona

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[6] As they did in their petition, petitioners also seek to leave the incorrect impression that respondents requested transfer to Arizona to avoid unfavorable rulings that the district court in Chicago already had made. Pet. Br. 6. In fact, the Milberg respondents filed a notice of related action with the Panel on February 9, 1993, *before* defendants filed any responsive pleading and *before* the Chicago judge made any substantive ruling. CR12.

state law claims for malicious prosecution and abuse of process pursuant to Rule 12(b)(6). J.A. 35; Pet. App. 80a-99a. In December 1993, the Milberg respondents moved for summary judgment on petitioners' remaining claims, CR177, CR181, but petitioners successfully moved under Rule 56(f) to defer resolution of the summary judgment motions pending further discovery. CR185; CR192. In August 1994, although discovery had not yet been completed and respondents' summary judgment motions remained pending, petitioners filed a motion requesting that Judge Roll suggest to the MDL Panel that it remand the case to Chicago. CR288. Judge Roll ruled that the motion was premature because discovery was ongoing, but that petitioners could renew their motion after discovery closed. CR311.[7]

On April 24, 1995, Judge Roll entered summary judgment in favor of the Milberg respondents on all of petitioners' claims, except for a defamation claim based on a letter to the editor of *The National Law Journal*. J.A. 36; Pet. App. 64a-79a. The district court held as a matter of law that the majority of the letter's contents were not defamatory, but that a jury question existed as to whether one passage was actionable. Pet. App. 69a-73a.

Thereafter, on May 5, 1995, Judge Roll transferred the case to the District of Arizona pursuant to section 1404(a) for trial of that remaining defamation claim. J.A. 20-21. Petitioners responded by petitioning the court of appeals for a writ of mandamus, which the court denied. J.A. 22-27. On July 25, 1995, trial commenced in Tucson, and on August 1, 1995, the jury returned a unanimous

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[7] After Judge Roll decided to hold petitioners' remand request in abeyance until the close of discovery, petitioners moved for reconsideration. CR328. When that failed, petitioners asked Judge Roll to recuse himself. CR343. Petitioners then attempted to fortify their recusal motion by portraying Judge Roll's senior colleague, Chief Judge Bilby, as an occurrence witness who inevitably would appear at trial. In addition, petitioners subpoenaed Judge Bilby for his deposition and demanded production of his bench files — a litigation stratagem that prompted the United States Attorney for the District of Arizona to intervene with a successful motion to quash. CR386; CR 394; CR430.

verdict in favor of respondents. J.A. 37; Pet. App. 53a-54a. At no time in the 12 months between petitioners' initial remand request and the entry of final judgment did petitioners ask the MDL Panel to remand the case — despite the existence of an MDL rule specifically authorizing such a motion by any party. MDL Rule 14(c), (d).

5. Appellate Proceedings In The Court Below.

On appeal, petitioners challenged the dismissal of their malicious prosecution and abuse of process claims, and further argued that the district court's later order transferring the sole surviving claim for trial was barred by 28 U.S.C. § 1407(a). J.A. 37-44, 48-55. However, petitioners did not assign any error in the court's conduct of trial proceedings, did not identify any prejudice resulting from the fact that those proceedings took place in Tucson rather than in Chicago, and did not allege any jurisdictional or venue defects associated with proceeding in the District of Arizona. Petitioners' sole contention with regard to the transfer order was that they were entitled to relitigate the case because they had been denied their purported right to have the case sent back to the original forum.

The Ninth Circuit, with Judge Kozinski dissenting, affirmed. J.A. 28-80. In an opinion authored by Judge Sneed, the court held that the district court's authority to transfer the case for trial under section 1404(a) is confirmed by the relevant statutory language and legislative history, the rules promulgated by the MDL Panel, and unanimous judicial precedents. J.A. 37-44. Moreover, the court concluded that petitioners were in no position to complain about that result, having failed to request a remand from the MDL Panel, even though only the MDL Panel could order that relief:

> The JPML's duty to remand was not activated. . . . [T]he trigger to such activation was never pulled. . . . Lexecon, in lieu of moving the JPML for a remand, brought its motion before the district court, and now appeals to us for a remedy. Neither this procedure, nor its earlier petition for a writ of mandamus, amounts to a motion for remand brought before the JPML. Lexecon failed to seek succor from the one source that easily could have granted it if it so chose. The district court, therefore, properly proceeded to conduct a trial on the single remaining defamation claim, following the completion of the pretrial proceedings.

J.A. 43-44.[8]

SUMMARY OF ARGUMENT

1. Petitioners seek to claim for themselves the "high road" of fidelity to statutory language and congressional intent. In fact, petitioners seek to have this Court rewrite the actual text of section 1407(a) and ignore the operative language of section 1407(b), which directs that transferee district courts "shall" conduct all "pretrial proceedings."

First, contrary to petitioners' contentions, section 1407(a) concerns the authority of the Panel, not that of the transferee district court. Section 1407(a) does not impose any duty on the transferee district court; instead, section 1407(a) provides that unless the MDL action has been terminated, the cases "shall be remanded *by the panel*" when pretrial proceedings are concluded. That distinction between the duties of the MDL Panel and those of the transferee district court is important, as the court below and other courts have recognized. Section 1407(a) reflects Congress' determination to confer on the Panel an extraordinary power to transfer related cases to one judicial district — including a district in which personal jurisdiction and venue otherwise would not exist. In granting the MDL Panel that extraordinary transfer power, Congress limited the Panel's authority to transfers for pretrial proceedings. Congress did not, as petitioners point out, authorize the MDL Panel to transfer cases for trial. But section 1407(a) does not say anything about limiting the *transferee district court's* power to rule on traditional transfer motions brought under section 1404(a). In deciding motions to transfer under section 1404(a), district courts can order transfer only to districts where the actions might have been brought. Thus, Congress imposed a

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[8] The Ninth Circuit also affirmed the dismissal of petitioners' malicious prosecution and abuse of process claims. J.A. 48-55. This Court declined to review that dismissal.

limitation on the Panel's extraordinary power to transfer cases to any district, including one in which personal jurisdiction and venue are lacking, but Congress did not say anything to suggest that MDL district courts lack authority to consider traditional transfer motions.

Second, petitioners also fail to respect the "plain language" of section 1407(b), which, unlike section 1407(a), does concern the powers of the transferee district court. Section 1407(b) provides that the transferee district court "shall" conduct "pretrial proceedings" in MDL actions. That authority is granted without limitation because Congress intended that upon transfer, the transferee court would supervise pretrial proceedings in the same way as it would in any other case. There is no basis to infer, as petitioners suggest, that the transferee court's power to conduct pretrial proceedings is limited *sub silentio* by the duty to remand imposed in a separate subsection dealing only with the scope of the MDL Panel's extraordinary transfer powers. If Congress truly had intended to limit the transferee district court's authority to conduct pretrial proceedings, it would have done so directly, in describing the transferee court's powers in subsection (b), rather than indirectly, by imposing a limitation on the MDL Panel's extraordinary transfer powers under subsection (a).

In addition to ignoring the governing language of section 1407, petitioners disregard material aspects of the history of its passage, which further undermine petitioners' contentions. Section 1407 was drafted by a special Committee of the Judicial Conference chaired by Chief Judge Alfred P. Murrah of the Tenth Circuit. In presenting the proposed legislation to Congress, the Murrah Committee specifically confirmed that cases might be transferred under section 1404 during consolidated pretrial proceedings. Moreover, within months of the enactment of section 1407, the first MDL Panel, chaired by Chief Judge Murrah, promulgated an MDL Rule expressly recognizing that MDL transferee judges have the same power to transfer cases for trial under section 1404(a) as they would in any other case. 47 F.R.D. 377, 381-82 (1969) (MDL Rule 15(b)). The historical record thus strongly supports the conclusion that the judges who wrote section 1407, and the Congress that ultimately enacted it, intended that section 1404(a) transfers could be ordered by transferee judges conducting "pretrial proceedings" under section 1407(b).

Finally, Congress acquiesced in the practice challenged in this case in 1976, when it enacted section 1407(h). In that provision, Congress revisited its prior determination to limit the MDL Panel's transfer authority to pretrial proceedings and decided to authorize the MDL Panel to transfer for pretrial *and* trial purposes a category of antitrust cases to any district. That provision is significant, among other reasons, because its introductory clause lists the impediments to transfers for trial purposes, but fails to list section 1407(a). Thus, Congress did not perceive any impediment to trial transfers imposed by section 1407(a). Moreover, the introductory clause expressly refers to section 1404, which shows that in 1976 Congress was well aware of the role that section 1404 transfers could play in section 1407 proceedings and acquiesced in that role.

2. Petitioners are equally incorrect in arguing that, even if a transferee court has the power to grant a trial transfer under section 1404(a), it cannot transfer the case to its own district. That argument is not within the question presented. In any event, such a transfer is, in fact, to an "other district" within the meaning of section 1404(a) because it changes the district in which the case otherwise would be tried.

3. Even assuming that Congress did intend that all MDL cases be remanded to their original districts for trial, that conclusion would not justify reversal of the judgment below.

First, petitioners never requested a remand from the MDL Panel — the sole tribunal empowered by the plain language of section 1407 to order that relief. Any duty to remand that may be imposed by section 1407 rests on the Panel. The Panel, in turn, has promulgated rules of procedure authorizing parties to file remand motions directly with the Panel. By failing to comply with the express statutory language and applicable MDL rule, petitioners deprived the Panel of the opportunity to evaluate petitioners' facial attack on the MDL rule that authorizes the trial transfer procedure challenged in this case. Moreover, by doing so, petitioners also avoided the statutory command that all Panel rulings shall be reviewable only by a petition for writ of mandamus.

Second, allowing petitioners to raise the remand issue after the entry of a final judgment would be particularly indefensible, because petitioners never have claimed any unfairness or error in the trial proceedings below — which indisputably occurred in a judicial district in which this case might have been brought originally. In deciding whether to reverse a judgment, this Court is required to disregard errors that caused no prejudice. *See* 28 U.S.C. § 2111 (emphasis added) ("On the hearing of any appeal or *writ of certiorari* in any case, the court *shall* give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties."). Because petitioners have not claimed any error in the trial or prejudice resulting from its location, any error in the district court's trial transfer order was plainly harmless. As this Court unanimously held last year in rejecting another plaintiff's challenge to a federal court judgment on the basis of an erroneous refusal to remand, the result petitioners seek is "incompatible with the fair and unprotracted administration of justice." *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467, 477 (1996). Petitioners do not even mention, let alone address, *Caterpillar* in their brief.

Third, the trial transfer issue need never have arisen because the sole defamation claim that survived for trial should have been dismissed as a matter of law during pretrial proceedings. *See Time, Inc. v. Pape*, 401 U.S. 279 (1971).

Finally, even if this Court were to announce a new rule overturning 30 years of MDL precedent, that new rule should be applied only prospectively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

4. Petitioners ask this Court to vacate all orders, apparently including the district court's summary judgment rulings, that were entered "after the conclusion of consolidated pretrial proceedings." Pet. Br. 32. But the only question presented in this case is whether the district court had authority to "transfer the case to itself *for purposes of trial*." Because the district court's summary judgment rulings were entered *before* the transfer order, and because the court's authority to enter those rulings is beyond dispute, petitioners' attempt to expand the potential relief encompassed by the question presented for review should be rejected.

ARGUMENT

I. THE DISTRICT COURT WAS EMPOWERED TO TRANSFER THE SOLE SURVIVING CLAIM FOR TRIAL.

Throughout their brief, petitioners blur important distinctions among sections 1407(a), 1407(b), and 1404(a). When those distinctions are fully understood, it becomes clear that Congress never had any intention of barring section 1404(a) trial transfer orders by MDL transferee courts.

A. The Plain Language.

Section 1407(a) concerns the authority of the Panel. That section establishes a procedure for transferring related cases pending in multiple districts to a single district for consolidated pretrial proceedings. A significant innovation of that statute is that it vests in a single tribunal, the MDL Panel, the authority to consolidate related cases in "any district," regardless of whether personal jurisdiction and venue would have been proper in that district. *See* 28 U.S.C. § 1407(a); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) (citation omitted) ("'[t]ransfers under section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue'"), *cert. denied*, 484 U.S. 1004 (1988).

Unlike section 1407(a), which concerns the authority of the MDL Panel, section 1407(b) defines the authority of the district courts to which MDL cases are transferred. Among other things, section 1407(b) mandates that the district court "shall" conduct "pretrial proceedings." *See* 28 U.S.C. § 1407(b). Section 1407(b) does not contain any limitation on the transferee court's authority to conduct pretrial proceedings.

Like section 1407, section 1404(a) provides for transfers of civil actions, but there also are key differences. Section 1404(a) authorizes

"a district court" to transfer civil actions for all purposes including trial, which is a broader power than Congress gave the MDL Panel under section 1407(a). But the district court's broad power to transfer civil actions for trial is also subject to a significant limitation. Unlike the MDL Panel's extraordinary power to transfer cases to districts without regard to personal jurisdiction or venue, a district court can order a section 1404(a) transfer only to a "district or division where [the action] might have been brought." 28 U.S.C. § 1404(a); *see In re New York City Mun. Sec. Litig.*, 572 F.2d 49, 51 (2d Cir. 1978) (Friendly, J.) ("§ 1407, unlike §§ 1404 and 1406, authorizes transfer of an action 'to any district' and not simply to a district where the action could have been brought. The use of this different language was deliberate; indeed, the limitation in § 1404 was one of the reasons why it was necessary to enact § 1407 . . . . ").

Ignoring the distinct features of those three provisions, petitioners isolate one passage in section 1407(a) and use it to challenge the result below. Specifically, petitioners rely on the clause providing that section 1407 actions "shall be remanded *by the panel*" at the conclusion of pretrial proceedings unless they have been terminated. According to petitioners, because Congress limited the MDL Panel's extraordinary authority to order a transfer to a district in which personal jurisdiction and venue would not otherwise exist, that limitation on the MDL Panel under section 1407(a) should be interpreted by this Court as a limitation on the transferee district court's authority to rule on a traditional trial transfer motion under section 1404.

Petitioners' argument is not persuasive. There is no reason to believe that, in legislating the duties of the MDL Panel under section 1407(a), Congress intended by implication to bar the transferee district court from adjudicating one type of motion that is frequently filed in the federal district courts during pretrial proceedings — a transfer motion under section 1404. To be sure, section 1407(a) reflects Congress' determination to limit the MDL Panel's extraordinary authority to transfer related actions to a single district without regard to personal jurisdiction and venue requirements. Congress limited that power to transfers for pretrial proceedings. But nothing in that provision suggests any intent on the part of Congress

to foreclose MDL district courts from using preexisting statutory authority to transfer MDL actions under section 1404(a) to districts where the actions "might have been brought," or from otherwise exercising their Article III powers to the fullest extent.

Indeed, every court that has considered the issue since Congress enacted section 1407 almost 30 years ago has rejected petitioners' reading of the statute. *See In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C. Cir. 1987) (D. H. Ginsburg & Williams, JJ., concurring) ("Congress contemplated that transferred cases might never return to the transferor courts, but instead might be . . . transferred under section 1404(a) to that same transferee court."), *aff'd on other grounds sub nom. Chan v. Korean Air Lines*, 490 U.S. 122 (1989); *Pfizer, Inc. v. Lord*, 447 F.2d 122, 124-25 (2d Cir. 1971) *(per curiam)*; *In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 819-20 (3d Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); *In re Food Lion, Inc. Fair Labor Standards Act "Effective Scheduling" Litig.*, 73 F.3d 528, 532 & n.7 (4th Cir. 1996); *accord* MDL Rule 14(b); P. Howard, *A Guide to Multidistrict Litigation*, 124 F.R.D. 479, 479 (1989); S. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 581 (1977). So established is the transfer procedure at issue that the *Manual for Complex Litigation* itself provides that "the transferee judge may transfer cases for trial to any district, including the § 1407 transferee district, permitted by 28 U.S.C. § 1404." *Manual for Complex Litigation, Third* § 31.132, at 254 & n.807 (1995).[9]

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[9] *See also In re Air Crash Disaster*, 86 F.3d 498, 512 (6th Cir. 1996); *In re Bendectin Litig.*, 857 F.2d 290, 295 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400, 402 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *Washington Pub. Utils. Group v. United States Dist. Ct.*, 843 F.2d 319, 326 (9th Cir. 1988); *Johnson v. Continental Airlines Corp.*, 964 F.2d 1059, 1061 (10th Cir. 1992); *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (Easterbrook, J., sitting by designation); *In re Air Crash Disaster*, 737 F. Supp. 391, 393 (E.D. Mich. 1989); *In re Tax Refund Litig.*, 723 F. Supp. 922, 923-24 (E.D.N.Y. 1989); *In re Longhorn Sec. Litig.*, 573 F. Supp. 274, 276 (W.D. Okla. 1983); *In re Viatron Computer Sys. Corp. Litig.*, 86 F.R.D. 431, 432 (D. Mass. 1980); *In re Air Crash Disaster*, 476 F.

The statutory provision setting forth the powers of MDL transferee courts is not section 1407(a), which deals with the powers of the MDL Panel, but section 1407(b). The plain language of section 1407(b), which petitioners would have this Court ignore, provides in mandatory terms that "pretrial proceedings *shall* be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation." 28 U.S.C. § 1407(b) (emphasis added). As the MDL Panel confirmed shortly after the passage of section 1407, the term "pretrial proceedings" self-evidently includes rulings on transfer motions under section 1404(a): "A transferee judge under Section 1407 has the responsibility for all pretrial proceedings in litigation assigned to him and the [section 1404(a)] motion before [the transferee court] is certainly a 'pretrial' motion." *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972).

Numerous other courts have confirmed that same point. As Judge Easterbrook stated while sitting by designation as a section 1407 transferee judge: "One of the *pretrial questions* within my province is whether to accept the magistrate's report and transfer the action to Illinois (that is, to me) under § 1404(a)." *In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 750 F. Supp. 330, 332 (N.D. Ill. 1990) (emphasis added); *accord Greyhound Computer Corp. v. IBM Corp.*, 342 F. Supp. 1143, 1145 (D. Minn. 1972); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299, 302-03

Supp. 445, 450 (J.P.M.L. 1979); *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403-04 (J.P.M.L. 1977); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.L. 1976); *In re Molinaro/Catanzaro Patent Litig.*, 402 F. Supp. 1404, 1405-06 (J.P.M.L. 1975); *Alaska Airlines v. United States*, 399 F. Supp. 906, 912 (N.D. Cal. 1975); *In re Bomb Disaster*, 399 F. Supp. 1400, 1403 (J.P.M.L. 1975); *In re Nat'l Student Mktg. Litig.*, 358 F. Supp. 1303, 1304 (J.P.M.L. 1973); *In re Brown Co. Sec. Litig.*, 355 F. Supp. 574, 577 (S.D.N.Y. 1973); *In re Air Crash Disaster*, 346 F. Supp. 533, 534 (J.P.M.L. 1972); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1404-05 (J.P.M.L. 1972); *In re Air Crash Disaster*, 342 F. Supp. 1400, 1403 & n.4 (J.P.M.L. 1973); *In re Air Crash Disaster*, 342 F. Supp. 907, 909 (D.N.H. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971).

(S.D.N.Y.), *mandamus denied sub nom. Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971); *Jack Winter, Inc. v. Koratron Co.*, 326 F. Supp. 121, 123 (N.D. Cal. 1971). Indeed, although Professor Charles Alan Wright appeared as an *amicus* supporting the petition for certiorari in this case, the treatise on federal practice that he co-authored with Professors Arthur R. Miller and Edward H. Cooper confirms that a motion to transfer under section 1404(a) is a "pretrial motion" that "falls naturally within the transferee judge's statutory power to control all pretrial proceedings." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3866, at 620 (2d ed. 1986).

Congress' straightforward and unqualified command that MDL transferee judges "shall" conduct "pretrial proceedings" reflects its intent that transferee judges would have the same Article III power to render appropriate relief in an MDL action as they would have in any other civil action. As the MDL Panel observed almost 30 years ago, an MDL consolidation order transfers entire 'civil actions,'" not "'civil actions or parts thereof.'" *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 489 (J.P.M.L. 1968). Thus, when a civil action is transferred to the transferee judge, the judge's power to conduct "pretrial proceedings" is unlimited:

> [T]he transfer scheme contemplates that a transferee court will adjudicate transferred cases no differently than cases originally filed before it. This is apparent throughout the scheme, from the point of transfer to the final disposition of the case. Rather than confine the transferee judge merely to presiding over the pretrial phase of cases that may be resolved finally in the transferor courts, section 1407 transfers jurisdiction over whole cases to the transferee court; upon transfer, the transferor courts retain no jurisdiction whatsoever. Indeed, Congress contemplated that transferred cases might never return to the transferor courts, but instead might be settled or resolved by summary judgment in the transferee court, or else transferred under section 1404(a) to that same transferee court for joint trial.

Korean Air Lines, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ. concurring); *see also Illinois Brick Co. v. Illinois*, 431 U.S. 720, 763

(1977) (Brennan, J., joined by Marshall and Blackmun, JJ., addressing in dissent an issue not reached by the Court) ("[T]he Judicial Panel on Multidistrict Litigation is empowered by 28 U.S.C. § 1407 to transfer cases involving common questions of fact to any district for coordinated pretrial proceedings . . . [and] [a]fter pretrial transfers under this section, cases can be consolidated and transferred to the same district for trial pursuant to the transfer power under § 1404(a).").[10]

The dissent below questioned whether section 1404 motions fall within the scope of the "pretrial proceedings" that a transferee court is authorized to resolve. J.A. 63-65. But the dissent's view of the statute is based in part on the notion that a transferee court should be considering only "motions that implicate more than a single case" and is constrained to leave motions that affect only one case unresolved for months or years. J.A. 64. Proceeding from that unique view, which finds no support in the statutory language, the dissent next proposed that still another limitation be engrafted onto the term "pretrial proceedings." Specifically, the dissent proposed that transferee courts only should supervise discovery, and that they may not rule on dispositive motions. J.A. 64-66 & n.7; *but see* R. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 Mich. L. Rev. 703, 751-52 (1995) (theory that transferee courts lack power to rule on section 1404 motions and dispositive motions, and should limit themselves to discovery matters, "is contrary to the language of the MDL Act, which gives the MDL court the power to conduct coordinated 'pretrial' proceedings, not merely discovery proceedings"). Given the extent to which the dissent departs from the plain meaning of the statutory language, petitioners

[10] The United States made the same point in its brief *amicus curiae* in *Illinois Brick*: "After pretrial transfers by the Panel [under section 1407], cases can be consolidated and transferred to the same district for trial under Section 1404(a)." *See* Br. at 25-26.

understandably do not urge this Court to adopt the dissent's analysis of section 1407(b).[11]

Instead, as noted above, petitioners argue that section 1407(a) should be interpreted to narrow the scope of section 1407(b). But the plain terms of section 1407(b) categorically authorize the transferee court to exercise full Article III powers in conducting "pretrial proceedings." Petitioners' argument, seeking to limit that plain statutory language, is based entirely on the supposed *implications* of language in section 1407(a) that are not well founded. Section 1407(a) provides that "[e]ach action so transferred shall be remanded *by the panel* at or before the conclusion of such pretrial proceedings . . . unless it shall have been previously terminated." 28 U.S.C. § 1407(a) (emphasis added). By that language, Congress sought to ensure that the MDL Panel's extraordinary authority to transfer actions to any district would apply only to pretrial proceedings. Nothing in section 1407(a) addresses a transferee district court's power to exercise preexisting statutory authority to transfer actions under section 1404(a) to districts in which the action "might have been brought" — a power that is unambiguously encompassed by section 1407(b)'s authorization to conduct "pretrial proceedings." Thus, as the court of appeals correctly held, petitioners' textual argument is unavailing because section 1407(a) is concerned with "creating and defining the functions of the JPML, not [with] redefining or circumscribing the traditional powers of the district court to which a case has been transferred" — powers that are addressed in section 1407(b). J.A. 41; *accord Pfizer*, 447 F.2d at 124 (emphasis in original) (the "shall be remanded" clause "deals *only* with the powers of the Multidistrict Litigation Panel, and not the powers of the judge to whom the case has been assigned").

[11] In reality, the authority of transferee courts to rule on dispositive motions is beyond reasonable dispute. *See, e.g.*, *Korean Air Lines*, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ., concurring); *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir. 1996); MDL Rule 14(a); H. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 ("the transferee district court would have authority to render summary judgment").

Petitioners nevertheless seek to salvage their section 1407(a) argument by contending, first, that a transferee court's powers cannot exceed those of the MDL Panel because the transferee court's powers are delegated by the Panel. Pet. Br. 16-17. That contention is meritless. A transferee court's powers are not delegated by the MDL Panel; those powers are created by Congress in the statute itself. Moreover, virtually everything that transferee courts are authorized to do — as Article III courts empowered to adjudicate all pretrial proceedings, including dispositive motions — is beyond the authority of the MDL Panel.

When petitioners purport to address the question of congressional intent, they are no more persuasive. Petitioners repeatedly point out that consolidated proceedings under section 1407 are limited to "pretrial proceedings." Pet. Br. 17-19. But that begs the question whether Congress intended by that limitation on the MDL Panel's extraordinary transfer power to restrict the transferee court's authority to rule on traditional motions to transfer under section 1404. In fact, there is no indication whatever that Congress so intended. As shown in the next section, Congress was fully aware of section 1404 and intended that it would play a role in MDL cases. *See* p. 25 *infra*. Under those circumstances, it would have been strange indeed for Congress to have gone about barring section 1404 transfers by transferee courts, not directly, by adding express limiting language to section 1407(b), but indirectly, by imposing a remand duty on the MDL Panel in section 1407(a).[12]

In the end, petitioners' argument reduces to the notion that there is an irreconcilable conflict between reading section 1407(b) as allowing trial transfers by transferee judges and section 1407(a)'s requirement that the Panel remand the case "to the district from which it was transferred" at the conclusion of pretrial proceedings. But again, petitioners' argument ignores the fact that those provisions

[12] Rather than explain the logic of their position, petitioners seek to persuade this Court by citing a litigation position taken in a brief by the Milberg Weiss firm as counsel in an unrelated case. Pet. Br. 16 n.4. But the fact that Milberg Weiss honored its fiduciary duty to present an argument for a client on an issue of law that this Court has not yet resolved obviously is entitled to no weight.

relate to different matters: Section 1407(b) addresses the transferee district court's traditional power to conduct "pretrial proceedings," and section 1407(a) addresses the MDL Panel's extraordinary power to consolidate related civil actions in any district. In addition, even setting aside that important distinction, section 1404 transfers by MDL district judges are fully consistent with the language of section 1407(a) on which petitioners rely. Section 1407(a) provides that each MDL case "shall be remanded by the panel," but the provision goes on to emphasize "unless the case shall have been previously terminated." Plainly, an action is "terminated," as far as the original district court and the MDL Panel are concerned, when the action is transferred under section 1404(a). *See, e.g.*, MDL Rule 14(b) (upon section 1404(a) transfer, "no further action of the Panel shall be necessary"); *Manual for Complex Litigation, Third*, § 31.132, at 254 (1995) ("An action is closed by appropriate orders entered in the transferee court, without further involvement by the panel or the original transferor court.").

Any other reading would be in tension with the broad language of section 1404(a), which provides that "a district court may transfer *any civil action*." 28 U.S.C. § 1404(a) (emphasis added); *see Ex parte Collett*, 337 U.S. 55, 58 (1949) ("The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."); 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3843, at 323 (2d ed. 1986) ("By its terms, 28 U.S.C.A. § 1404(a) applies to 'any civil action.' The courts have resisted all attempts to narrow the sweep of that all-inclusive phrase."); 1A J. Moore, *et al.*, *Moore's Federal Practice* ¶ 0.345[4.-1], at 4336 (2d ed. 1996) ("§ 1404(a) blankets the entire field of civil actions to include any and all noncriminal proceedings"). This Court repeatedly has held that the sweeping terms of section 1404(a) apply even to actions governed by special venue provisions. *Braden v. 30th Judicial Circuit Ct.*, 410 U.S. 484, 499 n.15 (1973) (habeas cases); *United States v. National City Lines, Inc.*, 337 U.S. 78, 80-84 (1949) (antitrust cases); *Collett*, 337 U.S. at 71-72 (FELA

cases); *see* 17 J. Moore, *et al.*, *Moore's Federal Practice* § 111.15[1] (3d ed. 1997).[13]

In sum, petitioners' so-called "plain language" argument actually is an invitation to rewrite the governing statutes. Nothing in the language of section 1407 suggests that Congress did not mean what it said when it accorded transferee district courts unlimited authority to conduct "pretrial proceedings" — proceedings that self-evidently include ordering section 1404(a) transfers in appropriate circumstances.

B. The Legislative History And The MDL Panel Rules.

Contrary to petitioners' contentions, Pet. Br. 21-24, the legislative history of section 1407 strongly supports the unanimous view of the federal courts that transferee courts are authorized to adjudicate motions under section 1404. Although petitioners make much of the language in the House and Senate reports noting that the MDL Panel's transfer authority under section 1407 would be limited to authorizing coordinated *pretrial* proceedings, that is simply a restatement of a limitation on the Panel's extraordinary transfer authority that is made clear by the statute itself. In section 1407, Congress limited the Panel's power to consolidate related cases in a single judicial district without regard to whether personal jurisdiction and venue requirements were met. Congress restricted that power to consolidations for pretrial proceedings. That limitation does not justify an inference that Congress also intended to limit the preexisting section 1404 powers of district courts, including transferee district

[13] Petitioners argue that the Congress that passed section 1404 could not have intended to authorize its use by MDL transferee courts, because section 1407 was enacted later. Pet. Br. 20. But Congress' intent in passing section 1404 in 1948 is not the issue. Rather, the question is whether Congress, in passing section 1407 in 1968, intended to preclude transferee district courts from ruling on traditional section 1404 transfer motions. In this regard, we note that section 1404 frequently has been applied in actions brought under *subsequently passed* statutes containing their own venue provisions. *See* 17 J. Moore, *et al.*, *Moore's Federal Practice* § 111.15[1], at 111-120 & nn.10 & 11 (3d ed. 1997) (FOIA and FIRREA actions).

courts, to transfer cases to districts in which those cases might have been brought.[14] Indeed, as the court of appeals recognized, J.A. 41-42, and as petitioners grudgingly (but explicitly) acknowledge in a footnote, Pet. Br. 23 n.7, the very congressional reports cited by petitioners qualify their statements about the desirability of remanding consolidated cases for trial by stating:

> Of course, 28 U.S.C. 1404, providing for changes of venue generally, is available in those instances where transfer of a case for all purposes is desirable.

H. Rep. No. 1130, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1898, 1902; S. Rep. No. 90-454, at 5 (1967); *see also* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1900 (emphasis added) (section 1407 "would not affect the place of trial in any case *or exclude the possibility of transfer under other Federal statutes*").

Thus, Congress plainly intended that section 1404 would play a role in MDL cases. The only remaining question is whether Congress intended to limit trial transfer motions to the times when they can be raised in the original forum — that is, before an MDL consolidation has occurred or after a case has been remanded. The historical record provides a definitive answer: Contrary to petitioners' extravagant contentions, the procedure of transferee courts considering section 1404 motions is not an unlawful, after-the-fact "power grab" by a group of federal judges bent on enhancing their own powers and expanding their already busy dockets. Pet. Br. 18, 25-26, 29, 31; J.A. 57. Instead, that procedure is a lawful means of resolving complex litigation efficiently and justly that was

[14] Petitioners also resort to sleight of hand in an attempt to make their citations to the legislative history appear more persuasive. Petitioners note in text that the House Report contemplated the possibility of future legislation authorizing the *MDL Panel* to consolidate cases for purposes of trial. Pet. Br. 23. In the accompanying footnote, that reference transforms into a statement "that further statutory amendments would be necessary to allow a *transferee court* the authority to keep a case for trial." Pet. Br. 23 n.7 (emphasis added). Nothing in the House Report comes close to making such a statement or to otherwise supporting petitioners' contentions. Congress clearly was addressing only the limits of the extraordinary power it was conferring upon the MDL Panel.

contemplated by the original *drafters* of the statute — a special Committee of judges of the Judicial Conference who ultimately became the inaugural members of the MDL Panel and who, within months of section 1407's enactment, promulgated a rule expressly authorizing MDL transferee judges to transfer cases under section 1404(a).

The Coordinating Committee for Multiple Litigation, which drafted section 1407, was initially appointed by Chief Justice Warren to deal with the hundreds of *Electrical Equipment* antitrust cases that flooded the federal courts in the early 1960s. *See* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1899; S. Rep. No. 454, at 3-4; *see generally* C. Bane, *The Electrical Equipment Conspiracies* (1973); P. Neal & P. Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964). Chaired by Chief Judge Alfred P. Murrah of the Tenth Circuit, the Committee developed a program of nationwide pretrial coordination for these cases, including a uniform pretrial discovery schedule, master pretrial orders, a central document depository, and a series of transfers under section 1404. *See* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1899; *Hearings on H.R. 8276 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong., 2d Sess., Serial No. 21, at 21-22.

As a result of the success of the Murrah Committee, the Judicial Conference authorized the Committee to study possible statutory changes needed to facilitate future coordination efforts. At the March 1965 meeting of the Judicial Conference, the Committee presented its draft of section 1407, which Congress ultimately enacted without material change. Report of the Proceedings of the Judicial Conference of the United States, March 18-19, 1965, at 12. The Murrah Committee's accompanying report stressed that the judge designated to preside over pretrial proceedings would have the power to conduct all such proceedings: "Under proposed § 1407 the transferee district court would have the usual powers provided by the Federal Rules of Civil Procedure, including authority to render summary judgment, to control and limit pre-trial proceedings, and to impose sanctions for failure to make discovery or comply with pre-trial orders." Report of the Co-Ordinating Committee on Multiple Litigation Recommending New Section 1407, Title 28, *reprinted in*

Plumbing Fixture Cases, 298 F. Supp. 499, *and in Hearings on H.R. 8276 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 89th Cong., 2d Sess., Serial No. 21, at 24. The Murrah Committee further stressed that its proposed legislation would preserve the power of the transferee district court to order transfers for trial under section 1404(a), during or at the close of "pretrial proceedings":

> This statute affects only the pre-trial stages in multi-district litigation. It would not affect the place of trial in any case or exclude transfer under other statutes (e.g., Title 28, U.S.C. §§ 1404(a) and 1406(a)) *prior to or at the conclusion of pre-trial proceedings*.

Id. (emphasis added).[15]

The Judicial Conference approved the bill and it was sent to Congress, where the key witnesses at House and Senate hearings were Judge Murrah, other members of his Committee, and the Committee's executive secretary. *See, e.g., Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 51-59 (statement and testimony of Chief Judge Alfred P. Murrah); *id.* at 4-7 (statement and testimony of Judge Edwin A. Robson); *id.* at 15-25 (statement and testimony of Judge William H. Becker); *Hearings on H.R. 8276 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess., Serial No. 21, at 26-36 (statement and testimony of Judge William H. Becker). At those hearings, the executive secretary made clear the role played by section 1404

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[15] The dissent below argued that this language "indicated that a venue transfer would only be available before or after, but not while, the case was in the MDL court." J.A. 79 n.21; *see also* Pet. Br. 23 n.7. That argument simply misreads the report. It assumes that the phrases "prior to" and "at the conclusion of" both modify "pretrial proceedings." But it makes no sense to suppose that the Committee intended to say that trial transfers may occur before or after pretrial proceedings. Pretrial proceedings begin with the filing of the complaint and end with the commencement of trial. All section 1404 orders occur *during* pretrial proceedings. What the Murrah Committee said was that section 1404 transfers may occur "prior to" or "at" the *conclusion* of pretrial proceedings — that is, at any time prior to trial.

transfers in coordinating the *Electrical Equipment* cases and testified that although section 1407 was concerned only with pretrial coordination, it could be used in conjunction with section 1404(a) to accomplish trial coordination as well:

> [Section 1407] provides that such a transfer shall take place under the provisions of this bill for the pretrial phases of the litigation, leaving the place of trial where the action began *or in some other district to which the action might conceivably be transferred under the existing provisions of section 1404(a).*

Id. at 23 (emphasis added).[16]

Section 1407 passed the Senate without any opposition on August 9, 1967, substantially as written by the Murrah Committee. 113 Cong. Rec. 22,123-24 (1967); *see* H. Rep. No. 1130, 1968 U.S.C.C.A.N. at 1898. The House then passed the measure on a voice vote, after incorporating two amendments proposed by the Justice Department that are not relevant to this case. 114 Cong. Rec. 4,924-28 (1968). The Senate agreed to the House amendments, 114 Cong. Rec. 9,657 (1968), and President Johnson signed section 1407 into law on April 29, 1968.

On May 31, 1968, pursuant to the authority vested in him by the newly enacted section 1407, the Chief Justice appointed seven judges to the first MDL Panel. The first Chairman of the Panel was Chief Judge Murrah, who was joined by two other members of the Murrah Committee — Judges Edwin A. Robson and William H. Becker. The remaining Panel members were Judges John Minor Wisdom, Edward Weinfeld, Joseph S. Lord, III, and Stanley A. Weigel. *See*

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[16] That sections 1407 and 1404(a) could be used in tandem to accomplish both coordinated pretrial and trial proceedings likewise was not lost on the bill's opponents, who complained during congressional hearings that "if the authority given by [proposed section 1407] and by § 1404 were combined, the transfer for discovery could well become a transfer for trial." *Hearings on S. 3815 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 89th Cong., 2d Sess., at 97 (objection of Phillip Price). Despite that objection, Congress passed the bill.

C. Peterson & J. McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J. 737, 740 (1970). Within months, the MDL Panel promulgated a detailed set of rules of procedure pursuant to the rulemaking authority conferred by section 1407(f). Included in that first set of substantive rules was MDL Rule 15(b), which expressly confirmed the power of MDL transferee judges to order section 1404(a) trial transfers to their own districts in the course of conducting "pretrial proceedings" under section 1407:

> (b) Actions will be remanded to the district from which they were transferred unless an order has been signed by the designated *transferee Judge transferring an action to another district under 28 U.S.C. § 1404(a)* or 28 U.S.C. § 1406(a). Such actions will be remanded by the Panel to the district designated in the Section 1404(a) or Section 1406(a) order.

47 F.R.D. 377, 381-82 (1969) (emphasis added). That rule is identical in all material respects to current MDL Rule 14(b).[17]

The foregoing history, culminating in the promulgation of a rule directly addressing the question presented in this case, demonstrates that Congress never intended to prohibit consideration of section 1404 motions in the months or years during which cases might be consolidated for pretrial proceedings under section 1407. *See, e.g., Morse v. Republican Party*, 116 S. Ct. 1186, 1200-03 (1996) (referring to legislative history and to "history that led to passage" of the Act at issue); *Reno v. Koray*, 515 U.S. 50, 59 (1995) (referring to provision's "context and history"). Indeed, as Judge Sneed correctly noted in the majority opinion below, this Court's decisions *require* a presumption, "absent compelling evidence to the contrary, that the rules promulgated pursuant to section 1407(f) are 'not inconsistent with Acts of Congress.'" J.A. 41 n.7; *see id. at* 42 (citing

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[17] Current MDL Rule 14(b) provides in pertinent part that MDL actions shall be remanded by the Panel to the transferor district for trial, "unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. 1404(a) or 28 U.S.C. 1406. In the event that the transferee judge so transfers an action under 28 U.S.C. § 1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial."

United States v. American Trucking Ass'n, 310 U.S. 534, 549 (1940)).

This Court frequently has emphasized the need for deference to administrative interpretations of statutes. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *American Trucking*, 310 U.S. at 549. In *American Trucking*, the Court held that deference to an agency's interpretation of a statute is especially appropriate when the agency itself "suggested the provisions' enactment to Congress" and rendered a "contemporaneous construction." 310 U.S. at 549; *see Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 414 (1993) (citations omitted) ("we generally will defer to a permissible interpretation espoused by the agency entrusted with [the statute's] implementation" and "[o]f particular relevance is the agency's contemporaneous construction which 'we have allowed to carry the day against doubts that might exist from a reading of the bare words of the statute'"); *Davis v. United States*, 495 U.S. 472, 484 (1990) ("we give an agency's interpretation and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use"); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 668 (1980) (citations omitted) (administrative practice "'has peculiar weight [because] it involves a contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion'" and is "strong support" for construction of statute). Those principles plainly apply here.

The dissent below argued that the MDL Rules merit no deference because they are not the product of formal rulemaking under the Rules Enabling Act or the Administrative Procedure Act. J.A. 76. But it is well established that the *Chevron* principle applies outside the context of formal administrative actions by executive agencies. *See Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (regulations of Council on Environmental Quality interpreting NEPA entitled to "substantial deference"); *McMillan Park Comm. v. National Capital Planning Comm'n*, 968 F.2d 1283, 1287-88 (D.C. Cir. 1992) (deferring to the Advisory Council on Historic Preservation); *Texas Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 689-90 (D.C. Cir. 1991) (deferring to the Legal Services Corporation); *see also United States v. LaBonte*, 117 S. Ct. 1673, 1686-87 (1997)

(Breyer, J., joined by Stevens and Ginsburg, JJ., addressing in dissent an issue the Court expressly declined to decide) (arguing for *Chevron* deference to Sentencing Commission's construction of statute it administers). In view of the MDL Panel's actual participation in the drafting and passage of section 1407, and the fact that the Panel consists of seven experienced federal judges appointed by the Chief Justice, this case would be a strange place to begin making exceptions to the deference principle.

C. Section 1407(h).

Congress' addition, in 1976, of a new subsection (h) to section 1407 is a further indication that Congress never understood section 1407(a) as barring section 1404 transfers by MDL transferee courts, and that Congress in fact acquiesced in that established procedure. Although petitioners argue that the 1976 amendment supports their position, precisely the opposite is true.

In section 1407(h), Congress extended the MDL Panel's section 1407 transfer power to encompass the power to transfer, for purposes of both pretrial *and* trial proceedings, a category of *parens patriae* cases brought by State Attorneys General under the antitrust laws. Petitioners suggest that this amendment would not have been necessary if Congress had interpreted pre-amendment section 1407 as allowing trial transfers under section 1404(a). Pet. Br. 15. But petitioners' line of argument ignores a fundamental difference between the operation of section 1404(a) and section 1407(h): Although section 1404(a) restricts transfers to judicial districts "where [the action] might have been brought," section 1407(h) authorizes the MDL Panel to transfer *parens patriae* actions to *any* judicial district, without regard to personal jurisdiction or venue requirements that might otherwise apply. *See* E. Olliff, *Parens Patriae Antitrust Actions for Treble Damages*, 14 Harv. J. Legis. 328, 353 n.149 (1977) ("[u]nder section [1407(h)], the frustrating requirement that venue must have been originally proper in the transferee district for an action to be tried there . . . has been abolished for *parens patriae* actions"); *see also In re New Mexico Natural Gas Antitrust Litig.*, 482 F. Supp. 333, 336 (J.P.M.L. 1979) (fact that all defendants are not subject to suit in transferee district does not prevent transfer for

pretrial proceedings). In addition, petitioners' argument ignores the fact that section 1407(h) conferred, for the first time, authority to order trial transfers *by the MDL Panel itself.*[18]

In truth, rather than supporting petitioners' contentions, Congress' 1976 addition of subsection (h) shows that Congress never intended section 1407 to foreclose section 1404(a) trial transfers by MDL transferee judges. That is revealed by the introductory clause of section 1407(h), in which Congress took care to identify in explicit terms any provisions of law that might be construed as limiting the broad trial transfer power that Congress was conferring on the Panel for the first time. Section 1407(h) provides:

> *Notwithstanding the provisions of section 1404 or subsection (f) of this section,* the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.[19]

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[18] *Amicus* University of California ignores that same distinction in attempting to derive significance from Congress' failure to enact proposed amendments to section 1407 that would have authorized trial transfers by the Panel in mass disaster cases. U.C. *Amicus* Br. 9-10. *Amicus* also fails to disclose other aspects of the proposed legislation that Congress might well have considered more objectionable than expanding section 1407 — such as the provision that would have extended federal jurisdiction by requiring only minimum diversity in mass disaster cases. *See* H. Rep. 102-1085, at 117-18 (1992). That same minimum diversity feature appeared in the failed 1988 legislation cited by *amicus* Washington Legal Foundation (W.L.F. *Amicus* Br. 10) — a point that *amicus* likewise fails to disclose. *See* H. Rep. No. 100-889, at 10 (1988).

Petitioners' *amici* advance other contentions not made by petitioners in this Court or below, including novel constitutional arguments irrelevant to this case. Because those contentions have not been preserved or presented by petitioners, they obviously are not before the Court. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 n.2 (1989); *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

[19] The legislative history does not illuminate the precise intent underlying the introductory clause of section 1407(h), but the plain language of that clause makes it reasonably clear that Congress conferred trial transfer power "[n]otwithstanding . . . section 1404 " because section 1404(a) provides that transfers can be only to districts "where [the action] might have been brought." Similarly, Congress conferred trial transfer power on the MDL Panel "[n]otwithstanding . . . subsection (f)," which authorizes the promulgation of the Panel's rules of procedure, because those rules provided at the time of the amendment that transfers for trial must be made in accordance with the venue and personal jurisdiction limitations set forth in sections 1404 and 1406. *See* Rule 11(b), 65 F.R.D. 253, 261 (1975) (MDL Rule in effect at time of passage of section 1407(h)). Because the whole point of section 1407(h) was to allow the MDL Panel to order transfers for both pretrial and trial purposes without regard to personal jurisdiction and venue requirements, Congress conferred that transfer power "notwithstanding" the foregoing provisions of law.

Thus, in the introductory clause of section 1407(h), Congress identified what it considered to be potential impediments to the trial transfer authority it was conferring, but in doing so, Congress did not identify section 1407(a). That is significant because under petitioners' theory of the case, the "shall be remanded" clause of section 1407(a) would have appeared to Congress to pose a far more formidable barrier to trial transfers by the MDL Panel than sections 1404 and 1407(f), the two provisions of law that Congress did identify in section 1407(h). For example, although section 1404(a) merely limits the number of available judicial districts to which a case may be transferred for trial, the "shall be remanded" clause of section 1407(a) requires, according to petitioners, that *all* cases transferred by the Panel be remanded to their original districts for trial. As the plain language of subsection (h) reveals, however, petitioners' reading of the "shall be remanded" clause cannot possibly be correct: If Congress had shared petitioners' view that section 1407(a) absolutely bars transfers of cases for trial, then the expansive power conferred by section 1407(h) not only would have been "[n]otwithstanding the provisions of section 1404 and subsection (f)," but also "[n]otwithstanding subsection (a) of this section." Given that subsection (a) is the provision of section 1407 that defines the basic jurisdiction of the MDL Panel, Congress surely would have looked there first in 1976 when it was identifying potential impediments to the trial transfer authority that it was about to confer on the MDL Panel.

The introductory clause of section 1407(h) is significant in this case not only for what it does not say, but also for what it does say — *i.e.*, its explicit reference to section 1404. That reference evinces Congress' awareness in 1976 of the interrelationship between sections 1407 and 1404, which was by then well-established in MDL practice. When Congress was considering whether to extend the MDL Panel's section 1407 power to transfer cases without regard for personal jurisdiction and venue limitations to include the power to transfer *parens patriae* cases for trial, Congress certainly would have been aware that transferee courts were universally viewed as having the power to order trial transfers under section 1404(a) to districts in which the cases might have been brought.[20]

It follows that this is an especially appropriate case to invoke the principle that Congress is presumed to be aware of a consistent and longstanding interpretation of an existing statute when Congress amends that statute. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 210-14 (1993); *Lindahl v. OPM*, 470 U.S. 768, 781-86 (1985). If Congress had disagreed with the MDL Panel's existing rules, which authorized transferee courts to exercise the same transfer authority that every federal district court had exercised since section 1404 was enacted in 1948, Congress could have legislated to the contrary. Because it failed to do so, while simultaneously enacting a new subsection with an introductory clause that accepts the prevailing interpretation, Congress acquiesced in the MDL rule and in the line of judicial decisions uniformly holding that section 1407 poses no barrier to section 1404(a) transfers by MDL transferee judges. *See*

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[20] By 1976, there was substantial case law on this issue. *See, e.g., Pfizer*, 447 F.2d at 125; *CBS Color Tube*, 342 F. Supp. at 1405. Indeed, the principle that section 1407(a) does not foreclose section 1404(a) transfers was so firmly established by then that the procedure was memorialized in the MDL Panel's rules and in the *Manual for Complex Litigation*. *See* MDL Rule 15(b), 47 F.R.D. 377, 381-82 (1969); MDL Rule 11(b), 65 F.R.D. 253, 261 (1975) (similar rule in effect when Congress enacted section 1407(h)); *Manual for Complex Litigation* § 5.22, at 78 & n.227 (CCH ed. 1973) (citing *Pfizer* for the proposition that "Section 1404(a) and Section 1407 are not mutually exclusive remedies but are cumulative, and may both be employed in respect to a given case").

Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60, 72-73 (1992); *see also id.* at 78 (Scalia, J., concurring) ("The Rehabilitation Act Amendments . . . must be read, in my view, not only 'as a validation of *Cannon*'s holding,' . . . but also as an implicit acknowledgment that damages are available.").

D. Common Sense.

Finally, construing section 1407 as authorizing trial transfers by MDL judges makes a great deal of sense. Section 1404(a), by its own terms, applies to "any civil action" — categorical language that this Court has stated means just what it says. *See Collett*, 337 U.S. at 58. Petitioners' interpretation of section 1407 would render section 1404(a) all but a dead letter in a common situation in which trial transfers are particularly likely to be desirable — when multiple related actions are pending in various districts and already have been consolidated for pretrial proceedings. It is well established that the transferor court loses jurisdiction to enter orders in a case once it has been transferred by the MDL Panel. *See, e.g., Korean Air Lines*, 829 F.2d at 1178 (D. H. Ginsburg & Williams, JJ., concurring) (confirming that transferor court has no jurisdiction to enter any orders during the pendency of any pretrial proceedings in the transferee court); *Glasstech, Inc. v. Ab Kyro Oy*, 769 F.2d 1574, 1576 (Fed. Cir. 1985) (same). Thus, petitioners effectively contend that, during the months or years when cases are pending in the transferee court, *no* court would have power to order a trial transfer.

There is no reason to believe that Congress would have intended such a result. As the Second Circuit concluded in *Pfizer*, MDL transferee judges must be able to adjudicate trial transfer motions lest there be a lengthy "gap" during which litigants have no recourse:

> This conclusion would clearly seem to comport with the essential purpose of section 1407 to "promote the just and efficient conduct" of complex multidistrict litigation. Since it is reasonably clear that, subsequent to a section 1407 transfer, and prior to a remand, the transferor court has no authority to entertain a section 1404(a) motion or any other motion, to hold that the transferee court also has no section 1404(a) authority

> would mean that all proceedings on any section 1404(a) motion would have to be suspended for the entire period of pretrial, the cases remanded to a number of different districts, and then each district judge consider separate 1404(a) motions. The inevitable result would be further extensive delay in litigation which already is among the most time consuming to appear on the federal dockets. We see no reason to sanction such a result.

447 F.2d at 125.

Requiring section 1404(a) motions to be held in abeyance until they can be presented to the transferor court on remand, in addition to introducing needless delay, would impair the efforts of transferee courts to bring order out of the chaos of numerous competing lawsuits. It is undeniable that there are many MDL cases in which the most sensible way to resolve the matter would be a trial conducted by the judge who has developed a full understanding of the controversy during months or years of pretrial proceedings.[21] Under petitioners' view of the statute, however, unless most or all of the transferor courts agree with that assessment and send the cases back to the transferee court, the benefits of consolidation for trial will be lost. Those decisions, in turn, will be made by judges who have the *least* knowledge of the litigation, and no knowledge of the "big picture," because they will have had no involvement with the case since entry of the initial consolidation order.

Petitioners seek to dignify that irrational outcome by portraying it, without any support for doing so, as a "carefully crafted legislative

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[21] Petitioners speculate that transferee courts will tend to abuse their power to order trial transfers in cases where they are not justified under the standards of section 1404(a). But the Court should not lightly assume that federal judges are prone to be self-aggrandizing by holding on to cases improperly. Nor should it be surprising that trial transfers are sometimes ordered in MDL cases. Petitioners' unsupported assertions to the contrary notwithstanding, Pet. Br. 20-21 n.6, it is fully legitimate for courts to give weight to the "judicial economy" produced by trying a case where it is already pending, before a court that has become fully familiar with the issues. *See, e.g., Regents of the Univ. of Calif. v. Eli Lilly & Co.*, 1997 WL 405946, at **4-5 (Fed. Cir. July 22, 1997).

compromise." Pet. Br. 19. But rather than supposing that Congress deliberately created a structure bound to produce such anomalous results, it makes far more sense to conclude that Congress understood that section 1404 transfers by transferee courts would be used in conjunction with section 1407 transfers by the MDL Panel. In conferring on the Panel extraordinary authority to consolidate cases without regard to personal jurisdiction and venue limitations, Congress chose not to empower the Panel to transfer cases for trial. But at the same time that it was conferring extraordinary new transfer powers on the MDL Panel, Congress was well aware of the district courts' preexisting statutory authority under section 1404 to transfer cases to districts in which they might have been brought. Inasmuch as the point of section 1407 was to grant new transfer authority to the Panel, not to limit the traditional transfer powers of the district courts, it is reasonable to conclude that Congress intended that the district courts selected to supervise MDL pretrial proceedings would continue to exercise the same section 1404 powers that were available to them in every other case. That reading of congressional intent best effectuates the terms of all the applicable statutory provisions governing transfer, and best advances the goals that lie at the heart of those provisions. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976) (statutes are to be read whenever possible to give effect to all of their terms); *accord Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322, 2327 (1995).

The unanimous acceptance of that reading by the federal courts over the past 30 years has been key to the use of MDL proceedings to resolve mass litigation typified by *Lincoln Savings*. There is no reason to change course now.[22]

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[22] The truth of the matter is that prevailing MDL procedures have worked extremely well. Those procedures have been invoked to bring about the just and efficient resolution of literally thousands of cases. As of September 30, 1996, the MDL Panel had centralized 109,410 cases for pretrial proceedings since the advent of section 1407. A total of 57,116 of those cases have been terminated in the transferee courts, 3,757 cases have been remanded for trial, and 48,258 cases remain pending in 43 transferee courts. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts, 1996 Report of the Director* 29. Contrary to petitioners' contentions, there is no justification, either in law or in common sense, for altering

II. IN DECIDING THE TRIAL TRANSFER MOTION, THE DISTRICT COURT WAS AUTHORIZED TO SELECT ARIZONA AS THE APPROPRIATE TRIAL VENUE.

The Court also should reject petitioners' fallback argument that the District of Arizona was the one place that Judge Roll could not choose when he ruled on the section 1404(a) motion. Following the dissent's lead, J.A. 68-69, petitioners contend that the language in section 1404(a) stating that a court may transfer an action "to *any other district or division* where it might have been brought" (emphasis added) bars an MDL transferee court from transferring the case for trial to its *own* district. Pet. Br. 19-20. But that argument is not even within the scope of the question presented, which is whether a transferee court may transfer a case to itself "notwithstanding section 1407(a)'s explicit command that every such case 'shall be remanded'" to the transferor district. Pet. Br. i. The proper interpretation of section 1404(a) plainly is not encompassed by that question.

In any event, the argument makes no sense. The most natural reading of the phrase "other district" would be as referring to a district "other" than the district in which the action was filed and otherwise would be tried. Under that reading, the trial transfer in this case was to an "other" district because, absent the transfer order, the trial would have occurred in Illinois.

Under petitioners' alternative construction of section 1404, that provision would have to be read to exclude the possibility of a transfer to the one district most likely to be the optimum forum for trial — the district where the case has been pending during pretrial proceedings. However, petitioners' "strict construction" approach is contrary to this Court's "common-sense approach . . . in interpreting § 1404(a)," *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 24-27 (1960); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988) (Congress intended section 1404 motions to be governed by a "flexible and multifaceted analysis"). Thus, for example, this Court has held

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fundamentally the way that the tens of thousands of pending and future MDL actions are to be adjudicated.

that an *appellate* court is empowered to order section 1404(a) transfers to other districts or divisions in certain circumstances, even though the statute provides that only a *district* court has that power. *See Koehring Co. v. Hyde Constr. Co.*, 382 U.S. 362, 365 (1966) ("We do not read 28 U.S.C. § 1404(a), providing that 'a district court may transfer any civil action,' as precluding an appellate court, where unusual circumstances indicate the necessity thereof, from effecting a transfer by direct order."). Given that it is appropriate to read "district court" to mean "appellate court" when it makes sense to do so, as *Koehring* establishes, petitioners' attempt to defeat the transfer in this case by resort to a cramped and nonsensical construction of the "other district" clause necessarily must fail.

III. EVEN IF THE COURT WERE TO CONCLUDE THAT THE TRANSFER DECISION WAS ERRONEOUS, THERE STILL WOULD BE NO BASIS FOR REVERSING THE JUDGMENT BELOW.

Even assuming that section 1407(a) required this case to be remanded to Illinois for trial, the proper result would still be affirmance of the district court's judgment on the merits. That is because: (1) petitioners failed to assert their trial transfer argument in the one forum in which they could have received the relief they sought, the MDL Panel; (2) any conceivable error would be harmless under 28 U.S.C. § 2111 and this Court's recent decision in *Caterpillar*; (3) the sole claim still at issue, a single defamation claim, is facially deficient as a matter of law; and (4) any new rule should be applied only prospectively.[23]

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[23] Thus, this Court either should affirm on any of the foregoing alternative grounds or dismiss the writ in this case as having been improvidently granted. This Court has followed both approaches in similar circumstances. *See Thigpen v. Roberts*, 468 U.S. 27, 29-30 (1984) (affirming on alternative ground); *Goins v. United States*, 306 U.S. 622, 623 (1939) (dismissing writ after briefing and oral argument because error assigned turned out to be nonprejudicial); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (dismissing writ when contentions were found to have been waived).

A. Petitioners Should Not Now Obtain Relief They Never Sought From The MDL Panel.

Even assuming for the sake of argument that petitioners are correct that a remand became mandatory once pretrial proceedings ended, the only entity that would have been empowered, and dutybound, to order a remand was the MDL Panel. Under the plain language of section 1407, the transferee court is not authorized to order a remand. As petitioners emphasize so often, section 1407(a) directs that MDL cases "shall be remanded *by the panel*." Moreover, under the MDL Rules, the transferee court's sole role is one of making a *suggestion* of remand to the Panel. MDL Rule 14(d). It follows that the appropriate way for petitioners to have sought the relief they wanted was through a motion to the Panel. The Panel's own rules set forth detailed provisions for such a motion. *See id.* Section 1407(e), in turn, provides the exclusive mechanism for seeking judicial review of the Panel's denial of the motion — a petition for a writ of mandamus filed in a court of appeals.

Petitioners never filed such a motion. As a result, the Panel itself never was given the opportunity to address petitioners' challenge to the MDL rule authorizing trial transfers by transferee courts. Moreover, the case never proceeded to the appellate court in the form of a mandamus action in which the Panel was a party and potential participant, as section 1407(e) would have required had petitioners followed proper procedures.

Having failed to follow the proper procedure, petitioners should be barred from raising the remand issue on appeal from a judgment following a full adjudication of the merits. Petitioners cannot attack an alleged violation of law *by the Panel* by appealing from a judgment entered *by the district court*. Under no theory did the district court have a duty to remand the case — because by law it had no power to do so. Petitioners simply ignore reality by suggesting that the district court issued a "ruling on a motion to remand," that the court had no "discretion to *refuse to remand* a case," and that the "district court must adhere to the same statutory limitations as the JPML in *deciding* the remand issue." Pet. Br. 16-17 & n.5 (emphasis added). In fact,

a transferee court does not order or refuse to order a remand; it decides only whether to make a suggestion to the Panel.

Congress has seen fit to vest in the Panel — composed of seven experienced federal judges appointed by the Chief Justice of the United States — exclusive authority to order section 1407 transfers and remands and to promulgate MDL rules of procedure. Petitioners' end-run around the Panel not only subverted the Panel's authority, but also prevented the Panel from bringing its expert judgment to bear on petitioners' facial attack on one of its own rules. Petitioners' decision to bypass the Panel also evaded section 1407(e), which states that review of Panel transfer and remand decisions can be sought *only* through a mandamus proceeding. Apparently, petitioners preferred to retain the option of raising the remand issue on appeal from a final judgment, and knew that this option would be foreclosed if they went to the Panel before trial, lost, and then failed to win relief in an immediate mandamus action. But as Judge Sneed concluded for the court of appeals, that stratagem should not be allowed to succeed: petitioners' failure "to seek succor from the one source that easily could have granted it" forecloses petitioners from now seeking it elsewhere. J.A. 43-44.

It is no answer for petitioners to say that the "proper practice" is to request a suggestion of remand from the district court "in the first instance." Pet. Br. 17 n.5. Petitioners took the first step under MDL Rule 14(d) by asking the district court for a suggestion of remand. But they never took the next step — filing a motion for a remand with the Panel. Petitioners thus made a deliberate choice not to seek relief from the only tribunal authorized under section 1407(a) to order a remand, the MDL Panel.

Nor is it an answer that, by the time of trial, the district court had entered its trial transfer order under section 1404(a). Under petitioners' legal theory, that order was ineffective and void because of section 1407(a), which they say imposed on the Panel a continuing duty to remand the case to the district court in which it was filed. If petitioners were correct, nothing about the section 1404(a) transfer order would have prevented the Panel from ordering a remand, or relieved the Panel of the duty to do so. Petitioners cannot

simultaneously attack the section 1404(a) order as lawless and use it as an excuse for failing to seek relief from the one tribunal that could have granted it under the plain language of section 1407(a) — the MDL Panel.

B. Any Error With Respect To The Trial Transfer Would Be Harmless Error That Could Not Affect The Result In This Court.

It would be particularly inappropriate to allow petitioners to assert the remand claim now as a basis for overturning the judgment below for a second reason: Not only did petitioners fail to seek relief from the MDL Panel before trial, but they have failed to point to any aspect of the district court proceedings suggesting that they received anything less than a full and fair consideration of their claims. Under 28 U.S.C. § 2111, the Court is required to address and decide this issue. Section 2111 expressly provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court *shall* give judgment after an examination of the record *without regard to errors or defects which do not affect the substantial rights of the parties*." *Id.* (emphasis added); *see* Fed. R. Civ. P. 61. Petitioners have not even suggested any error affecting their "substantial rights." It follows that section 2111 mandates affirmance.

The harmless error analysis is particularly straightforward in this case because it does not require *any* "examination of the record." Petitioners have never complained of any error in the conduct of the trial itself. In the Ninth Circuit, they attacked the trial verdict solely on the basis of the supposedly erroneous trial transfer order. Moreover, petitioners have never contended, let alone established, that they were legally prejudiced by the fact that the trial occurred in Tucson rather than Chicago.[24]

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[24] Petitioners complain in their statement of background facts that there was "much popular feeling" against Charles Keating in Arizona (Pet. Br. 9), but that assertion of indirect prejudice is not one that petitioners made, let alone supported, in any of their court of appeals filings. The "popular feeling" theory is a creation of the dissenting judge below, who referred to it in his second (but not his first) opinion in this case. J.A. 74. The dissent cited no evidence of record to support the theory that there was any "popular feeling" against Keating in Tucson, much less that it was so much greater in Tucson than it was in Chicago that it might have influenced the outcome with respect to third parties like petitioners. In fact, there is not a scintilla of support in the record for the "popular feeling" theory.

The only question, therefore, is whether the district court's section 1404(a) trial transfer order, assuming it was erroneous, is the type of order that by its very nature affects "substantial rights." Petitioners seek to make this point by citing cases in which statutory venue did not exist. *See* Pet. Br. 32 (citing *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260 (1961); *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979)). In so doing, they blur the distinction between (1) trial in a district lacking venue and (2) trial after a case has been erroneously transferred under section 1404(a) to a district in which venue was proper — that is, a district "where it might have been brought."

Petitioners seek to leave the impression that the locus of the trial in this case fell within the first category — that is, a district "lacking venue." That suggestion is plainly incorrect. There is no doubt that the District of Arizona had proper venue to try this case, because virtually all of the underlying events took place there. See 28 U.S.C. § 1391(a)(2) (venue exists where "a substantial part" of the underlying events occurred). That fact alone renders inapposite the improper venue cases cited by petitioners.

Instead, petitioners' claimed right to a remand is analogous to a claim of improper transfer to a proper venue. That is not a basis for reversal after judgmen following an error-free trial. Plaintiffs' right of choice among permissible fora is only a conditional right that frequently gives way in appropriate circumstances, as the very existence of sections 1404(a) and 1407 establishes.[25] To our

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[25] Indeed, this Court has held that new statutes concerning venue and transfer — statutes that clearly can have a direct impact on plaintiffs' choice of forum — may be applied retroactively to cases pending at the time of the statute's enactments because those statutes are "wholly procedural." *Denver & Rio*

knowledge, *no* court ever has reversed a judgment on the merits based on an erroneous transfer when, as in this case: (1) trial proceedings took place in a district where the action could have been brought originally (that is, where statutory venue requirements were satisfied), and (2) no showing of actual prejudice was advanced, let alone established. After all, ordering reversal in that circumstance would give the losing litigant a second bite at the apple, without any reason to believe that justice was not done in the first trial. *See Magnetic Eng'g & Mfg. v. Dings Mfg. Co.*, 178 F.2d 866, 869 (2d Cir. 1950) ("[u]pon an appeal from a final judgment against it, it will be difficult for the plaintiff to show that it lost the case because of the handicap of the transfer"); *Filmline (Cross-Country) Prod., Inc. v. United Artists Corp.*, 865 F.2d 513, 520 (2d Cir. 1989) (citations omitted) ("'[s]hould [the movant] finally lose on the merits below, any error in the interlocutory order'" denying a change of venue probably would not constitute reversible error because the movant "'could hardly show that a different result would have been reached had the suit been transferred'");15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3855, at 472-74 (2d ed. 1986) ("The [section 1404(a)] order can be reviewed on appeal from a final judgment in the action, although it is very unlikely to constitute reversible error at that stage of the case").

Indeed, this Court recently confirmed that when a plaintiff receives an adjudication free of error and prejudice in a federal court having jurisdiction and statutory venue at the time of judgment — as petitioners unquestionably did — considerations of finality, efficiency, and economy override any error in a prior refusal to order a remand to plaintiff's chosen forum. In *Caterpillar, Inc. v. Lewis*, 117 S. Ct. 467 (1996), a defendant removed a state court case to federal court purportedly on the basis of diversity of citizenship. However, because the district court indisputably did not have subject matter jurisdiction, plaintiff moved for a remand. In the face of the clear statutory mandate that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the

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Grande Western R.R. v. Brotherhood of R.R. Trainmen, 387 U.S. 556, 563 (1967); *Collett*, 337 U.S. at 71.

case *shall be remanded*," 28 U.S.C. § 1447(c) (emphasis added), the district court refused to order a remand. The court then proceeded to supervise pretrial proceedings despite lacking subject matter jurisdiction to do so. Eventually, certain parties settled and dropped out of the case. As a result, diversity jurisdiction did exist at the time of trial and the entry of judgment in favor of defendant.

On appeal, plaintiff argued that he was entitled to another trial because he had been erroneously denied his right to choose the forum and because the mandate of section 1447(c), that the case "shall be remanded" if jurisdiction is lacking "at any time," was violated. Despite the undisputed fact that the district court did not have subject matter jurisdiction at the time the remand motion was made, and the fact that the case could never have been validly removed to federal court because the deadline for doing so ran long before there was complete diversity among the parties, this Court held that plaintiff's contentions were overshadowed by "considerations of finality, efficiency, and economy":

> These arguments are hardly meritless, but they run up against an overriding consideration. Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie* . . . , considerations of finality, efficiency, and economy become overwhelming. . . . To wipe out the adjudication post-judgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice.

Id. at 476-77.

Those considerations dictate the same result in this case. Like the plaintiff in *Caterpillar*, petitioners complain that their initial choice of forum was frustrated and that the governing law requires that their lawsuit "shall be remanded" to the forum in which the case was filed. Nonetheless, as in *Caterpillar*, any purported error in that ruling is overcome by "considerations of finality, efficiency, and economy" that arise from the final judgment in this case, which was

entered in a court of competent jurisdiction after full discovery and an error- and prejudice-free jury trial.

Indeed, that conclusion applies with even greater force in this case. Unlike the district court in *Caterpillar*, which lacked subject matter jurisdiction for much of the time the case was pending in federal court, the district court in this case had jurisdiction and venue to hear the case at all times. Only the plaintiffs' choice of forum is at issue. Moreover, in *Caterpillar*, the limits on removal from state court that had been raised as a basis for overturning a merits judgment were premised on fundamental principles of federalism and comity — considerations far weightier than the right of choice among the permissible *federal* fora at issue in this case. Finally, unlike the *Caterpillar* plaintiff, petitioners have not suggested any differences in the way the lawsuit would have proceeded had it been litigated in the Northern District of Illinois rather than in the District of Arizona. *See* 117 S. Ct. at 176 n.14 (citing differences between fora raised by plaintiff). Because "[n]othing but a waste of time and resources would be engendered by remanding to the District Court or by forcing the[] parties to begin anew," the decision below must be affirmed. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 838 (1989).

C. The Single Claim That Survived For Trial Should Have Been Dismissed As A Matter Of Law During Pretrial Proceedings.

The decision below should be affirmed for one more reason: the trial transfer issue should never have arisen because the sole claim that survived for trial — the defamation claim — should have been dismissed during pretrial proceedings.[26] That claim was based upon a single sentence in a letter written by one of the respondents to the editor of *The National Law Journal*, in response to an earlier story in the same publication. The sentence stated: "Lexecon's motion for

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[26] Although the legal insufficiency of petitioners' defamation claim was raised in the court of appeals as an alternative ground for affirmance, the court did not reach the issue. Nonetheless, this Court can and should do so. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 346-53 (1986) (affirming on alternative ground); *Thigpen*, 468 U.S. at 29-30 (same).

summary judgment also was denied by Judge Richard M. Bilby in a published opinion that details its wrongful activities on behalf of convicted felon Charles H. Keating, Jr.'s American Continental Corp. and Lincoln Savings & Loan in fraudulent dealings with federal regulators." Pet. App. 71(a). The letter then provided the precise citation to Judge Bilby's published opinion. *Id.* Because the respondent did not use the word "alleged" in referring to the wrongful activities detailed in Judge Bilby's published summary judgment decision, the district court believed that a fact question existed concerning whether the respondent had defamed Lexecon. Pet. App. 69-73a.

That defamation claim should have been dismissed as a matter of law under this Court's decision in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and its progeny. In *Pape*, this Court reversed a libel judgment against *Time* magazine, which had run a story about a government commission's report concerning civil rights abuses by police officers. This Court held that even though the report made clear that the description of the incident was drawn from allegations in a civil complaint, the article's failure to use the word "alleged" in summarizing those allegations could not give rise to liability. *Id.* at 290. For the same reason, the defamation claim in this case should never have survived for trial. The judgment below should therefore be affirmed.

D. Any New Rule Regarding Transfer Should Be Applied Only Prospectively.

Even if this Court were to overturn MDL Rule 14(b) and 30 years of unanimous precedent, which recognize the power of MDL transferee courts to transfer cases under section 1404(a), that decision should be applied only prospectively. Such a decision would establish a new rule of law. Moreover, prospective application of that new rule would not retard its operation, and retroactive application of the new rule would produce substantial inequitable results to the parties here and to those in numerous other MDL actions. *See Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971); *see also Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

IV. PETITIONERS' ATTEMPT TO SECURE RELIEF BEYOND THE SCOPE OF THE QUESTION PRESENTED SHOULD BE REJECTED.

The question presented for review is limited to whether the district court had authority to "transfer the case to itself for *purposes of trial*" (emphasis added). Because the defamation claim discussed above is the sole claim that survived for trial, it is the only claim that could be affected by a reversal. All other claims were rejected prior to trial, on a motion to dismiss or a motion for summary judgment, and there is no substantial argument about the district court's authority to issue those pretrial rulings. Moreover, with regard to the district court's rulings on the motions to dismiss, they were affirmed on appeal by the court of appeals, and this Court declined to grant further review. With regard to the district court's summary judgment rulings, petitioners did not challenge their correctness on appeal.

Petitioners nonetheless appear to suggest that there is more at stake than a retrial of the defamation claim — that is, that the district court's summary judgment ruling may have been improper because there purportedly were no "consolidated" proceedings ongoing at the time of that ruling. *See* Pet. Br. 32 (asking that the Court "vacate all district court orders after the conclusion of consolidated pretrial proceedings"). But even if that issue were properly before the Court, which it is not, the challenged transfer order was entered *after* the district court ruled on the summary judgment motions. Moreover, the transferee court's authority to rule on dispositive motions does not evaporate at some metaphysical point in time when "consolidated pretrial proceedings" are deemed concluded. It is cut off only when the MDL Panel remands the case to another court. That never occurred, given that petitioners never asked the MDL Panel to enter such an order.

Consequently, petitioners' attempt to expand the relief fairly encompassed by the question presented for review should be rejected. The only issue left open is the one on which this Court granted review — the transfer "for purposes of trial." Thus, in the event that the transfer order is reversed and further proceedings are required, those

proceedings properly would be confined to the sole defamation claim that survived for trial.

* * *

Although they purport to champion the "plain language" of section 1407(a), the reality is that petitioners ask this Court to rewrite or ignore the plain language of section 1407(a), section 1407(b), section 1407(e), section 1404(a), and section 2111. Thus, petitioners can prevail on the transfer issue only if this Court rewrites section 1407(a) to provide that MDL cases that have not been terminated "shall be remanded *by the transferee court*" rather than "by the panel." Similarly, petitioners ask this Court to rewrite section 1407(b) to refer to "pretrial proceedings *except for motions to transfer under section 1404(a)*" and to rewrite section 1404(a) to authorize a "district court *other than an MDL transferee court*" to transfer "any civil action *other than an action previously transferred under section 1407.*" They further ask the Court to overlook their failure to go to the Panel, and section 1407(e)'s mandate that Panel orders be reviewed only through mandamus proceedings. Finally, petitioners ask this Court to ignore section 2111's express mandate that this Court "shall" give judgment without regard to errors that are harmless. In fact, however, the plain language of the governing statutes cannot be ignored. Nor is there any reason for this Court to depart from almost 30 years of settled precedent or to disrupt the effective functioning of established multidistrict practice.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted or the judgment below should be affirmed.

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APPENDIX

The multidistrict litigation statute, 28 U.S.C. §§ 1407(a), (b), (e), (f), and (h), provides in pertinent part:

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district.

. . . .

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.

. . . .

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

. . . .

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

The federal transfer statute, 28 U.S.C. § 1404(a), provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.